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No. 08-1401

Supreme Court, U.S.
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In the Supreme Court of the United States

LINDA METRISH, WARDEN,
Petitioner,

v

DANIEL NEWMAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

Michael A. Cox
Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Raina I. Korbakis
Assistant Attorney General
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
SUPPLEMENTAL BRIEF FOR PETITIONER 1
CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Commonwealth v. O'Laughlin,
446 Mass. 188, 843 N.E.2d 617 (Mass. 2006)..... 4

Commonwealth v. O'Laughlin,
63 Mass. App. Ct. 805, 830 N.E.2d 222 (Mass. App. Ct. 2005)..... 4

Jackson v. Virginia,
443 U.S. 307 (1979)..... 1

Newman v. Metrish,
543 F.3d 793 (6th Cir. 2008)..... 4, 9

O'Laughlin v. O'Brien,
2009 U.S. App. LEXIS 17646 (dec'd 8/7/09).. 1, 6, 7, 8

O'Laughlin v. O'Brien,
568 F.3d 287 (1st Cir. 2009)..... 1, 4, 5, 6

SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to this Court's Rule 15.8, Petitioner submits this supplemental brief calling the Court's attention to a recent published decision by the United States Court of Appeals for the First Circuit that is relevant to the pending petition for certiorari in this case. The recent decision, *O'Laughlin v. O'Brien*,[1] and the First Circuit's subsequent order denying the petition for panel rehearing and rehearing en banc,[2] confirm that the issues presented in the petition for writ of certiorari are of exceptional importance, with implications well beyond this case and the Sixth Circuit. Echoing the concerns voiced by Sixth Circuit Judge Sutton in his dissent below in *Newman*, Chief Judge Lynch stated in her dissent to the denial of en banc review by the First Circuit in *O'Laughlin* that "[t]he devaluation of circumstantial evidence by a habeas court has sweeping implications."

In analyzing a sufficiency of the evidence claim in *O'Laughlin*, the First Circuit applied the "reasonable speculation" rule set forth in this case by the Sixth Circuit despite the fact that this "rule" has never been squarely established by this Court and, in fact, conflicts with this Court's decision in *Jackson v. Virginia*.[3]

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[1] *O'Laughlin v. O'Brien*, 568 F.3d 287 (1st Cir. 2009).

[2] *O'Laughlin v. O'Brien*, 2009 U.S. App. LEXIS 17646 (dec'd 8/7/09). While the concurring opinion in the denial of the rehearing en banc states that the panel did not follow *Newman*, it is plain that the Sixth Circuit's decision in *Newman* figured prominently in the First Circuit's panel decision. Moreover, the concurring opinion was signed by only one of the three members of the panel.

[3] *Jackson v. Virginia*, 443 U.S. 307 (1979). See also Petition for Writ of Certiorari and Reply Brief.

The significance of *O'Laughlin* is that it underscores the need to review this case, as it plainly demonstrates that the "reasonable speculation" standard from *Newman* has now gained currency in another Circuit, over prescient and robust dissents in both federal circuits. This new standard, coined in *Newman*, is fully deserving of such dissents because it represents a substantial departure from the deference to be accorded State court determinations that Congress and this Court require under the Antiterrorism and Effective Death Penalty Act (AEDPA).

In *O'Laughlin*, a Massachusetts jury convicted Michael O'Laughlin of several charges relating to the near fatal nighttime beating of his neighbor, Annmarie Kotowski. The evidence against O'Laughlin, while circumstantial, was compelling:

- Police encountered O'Laughlin near the scene of the crime just minutes after the attack and noticed the next day that he had a cut on his face and a bruise below his left ear, which were consistent with being involved in a struggle.

- Kotowski knew O'Laughlin but had been cool to his interest in her.

- Police found a weapon that could have been used in the attack – a baseball bat with O'Laughlin's name inscribed on the barrel – hidden under some leaves in the woods behind the apartment complex.

- O'Laughlin had the means to perpetrate this attack – he lived only two doors down from Kotowski and, as a maintenance worker in the

apartment complex, had a key to Kotowski's apartment, had been there, and knew the apartment's layout. That level of access was necessary to commit the crime because the police found no signs of forced entry into Kotowski's apartment.

- O'Laughlin also had a motive. He had smoked crack cocaine in the hours before the attack and had called several drug dealers from the telephone in his apartment only minutes before the attack, desperately seeking more drugs. O'Laughlin had no money to buy more drugs that night, and he thought that Kotowski was well off from seeing her apartment.

- O'Laughlin demonstrated a consciousness of guilt. He appeared "uneasy and distant" when the police encountered him outside shortly after 2:00 a.m. in near-freezing temperatures wearing nothing but his boxer shorts.

- O'Laughlin told the police a series of lies and repeatedly shifted his story as to what he was doing on the night of the attack, and instead of disclosing information about the apartment complex that would help police he misdirected them by changing their focus.

- When the police returned to the apartment complex the next day, O'Laughlin refused to let the police swab what appeared to be a blood stain in his apartment and cleaned up the stain before allowing the police to return.

- O'Laughlin gave a number of inconsistent, and sometimes inherently incredible, statements about the events of that night.[4]

The marshalling of circumstantial evidence by Chief Judge Lynch in the First Circuit was the same in kind to the listing of powerful circumstantial evidence in *Newman* that Judge Sutton identified as supporting the verdict in this case.[5]

Like the Michigan Court of Appeals in *Newman,* the Supreme Judicial Court of Massachusetts ("SJC") unanimously upheld O'Laughlin's conviction,[6] reversing the intermediate State appellate court's holding that the evidence was insufficient.[7] The federal district court judge denied O'Laughlin's habeas petition, stating that "like the courts that have looked at this cold record before me, this is a close question. But the petition must be under federal law denied."[8] The First Circuit on federal habeas review, however, held, that the evidence against O'Laughlin was insufficient to support the conviction and held that the SJC's contrary determination was an unreasonable application of clearly established federal law.[9]

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[4] This evidence was summarized by Chief Judge Lynch in her dissent from the order denying rehearing en banc.

[5] *Newman v. Metrish*, 543 F.3d 793 (6th Cir. 2008).

[6] *Commonwealth v. O'Laughlin*, 446 Mass. 188, 843 N.E.2d 617 (Mass. 2006).

[7] *Commonwealth v. O'Laughlin*, 63 Mass. App. Ct. 805, 830 N.E.2d 222 (Mass. App. Ct. 2005).

[8] *O'Laughlin*, 568 F.3d at 298.

[9] *O'Laughlin v. O'Brien*, 568 F.3d 287 (1st Cir. 2009).

The State of Massachusetts filed a petition for panel rehearing and rehearing en banc, arguing that the panel's application of the Sixth Circuit's "reasonable speculation" standard conflicted with *Jackson*, that the panel decision therefore improperly viewed the evidence in a piecemeal fashion and failed to draw all inferences in favor of the verdict, and that the panel violated the strictures of AEDPA. The State's petition was denied. Chief Judge Lynch, however, filed a noteworthy dissent, finding that the State's petition raised significant issues of law warranting rehearing en banc.

The First Circuit panel's published decision granting habeas relief on sufficiency grounds adopted the Sixth Circuit's formulation of the standard in *Newman v. Metrish*, stating:

> As our sister circuit has noted, "[a]lthough circumstantial evidence alone can support a conviction, there are times that it amounts to only a reasonable speculation and not to sufficient evidence." Newman, 543 F.3d at 796. This is such a case.
>
> The instant facts may support a reasonable speculation that that O'Laughlin was the assailant, but not sufficient evidence to establish his guilt."[10]

The panel in *O'Laughlin* then reviewed the evidence the State court had found supportive of the jury's verdict and found alternative explanations, noting, for example, that "the petitioner has the better of the

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[10] *O'Laughlin*, 568 F.3d at 302.

argument with respect to the means evidence introduced by the prosecution at trial."[11]

Chief Judge Lynch was rightly troubled by the panel's use of the Sixth Circuit's "reasonable speculation" standard—a standard that appears nowhere in *Jackson* or any of this Court's sufficiency jurisprudence. Chief Judge Lynch correctly pointed out that the "reasonable speculation" standard is materially different from the *Jackson* standard, in that it prohibits convictions from resting on *reasonable* inferences drawn from the evidence, and that the term "reasonable speculation" is itself a contradiction in terms.[12]

Moreover, Chief Judge Lynch astutely recognized that this devaluation of circumstantial evidence by a federal habeas court has "sweeping implications" for State prosecutions, which in many cases rely heavily on circumstantial evidence to prove cases guilt when direct witness testimony about the commission of a crime is unavailable.[13]

Furthermore, Chief Judge Lynch was also correct to recognize the panel's piecemeal approach to analyzing the evidence and its readiness to reweigh the evidence and draw inferences contrary to the jury's verdict. Such an approach, which amounts to a de novo assessment of the record, should not be undertaken by an appellate court and is of significant concern to the States:

> This model of effectively performing de novo review rather than drawing inferences in favor of

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[11] *O'Laughlin*, 568 F.3d at 303, n. 19.

[12] *O'Laughlin*, 2009 U.S. App. LEXIS 17646, *13.

[13] *O'Laughlin*, 2009 U.S. App. LEXIS 17646, *13.

> the verdict, if widely adopted, would have unfortunate consequences. It calls for appellate courts to make determinations that are well beyond the institutional capacity of a court to do working from a cold record. And it conflicts with the usual rules of finality, effectively giving criminal defendants multiple opportunities to make their case in the first instance. Indeed, the government is particularly prejudiced when we overreach to decide these cases on sufficiency grounds because principles of double jeopardy prevent the habeas petitioner from being retried. . . . [14]

Not only did the panel in *O'Laughlin* take a piecemeal approach to analyzing the evidence and substitute its own independent assessment of the record for that of the jury's, but it substantially departed from the level of deference to be accorded to State court determinations that Congress and this Court have provided the federal courts under AEDPA. This is remarkably similar to what the panel majority did in *Newman*, and evinces an emerging pattern of non-compliance with this Court's precedent and with the AEDPA by labeling circumstantial evidence as mere "unreasonable speculation."

While sufficiency questions are inherently fact-bound, Chief Judge Lynch's concerns with the panel's opinion "run far deeper" than a dispute over the facts in *O'Laughlin*:

> In my view, the panel's implicit adoption of the "reasonable speculation" standard impermissibly alters our circuit's approach to sufficiency

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[14] *O'Laughlin*, 2009 U.S. App. LEXIS 17646, *26.

> questions, substantially disadvantaging whole categories of cases -- like domestic and acquaintance violence prosecutions -- where the government's evidence is largely circumstantial. And the panel's approach sets a dangerous precedent to the extent that it deviates from the narrow role Congress envisioned for federal habeas review under AEDPA by substituting the federal court's own independent assessment of the facts for the state court's.[15]

Chief Judge Lynch was correct to recognize the troubling nature of the panel's decision in *O'Laughlin* and the wide implications of that decision—and the Sixth Circuit's decision in *Newman*—with respect to sufficiency issues on federal habeas review. The panel's decision not only devalues circumstantial evidence, but also devalues verdicts reached by juries. In *O'Laughlin*, a jury—who was in the best position to assess credibility, evaluate testimony, and make findings of fact—heard and considered all of the evidence presented and determined beyond a reasonable doubt that O'Laughlin perpetrated the attack.

As Petitioner argued in its Reply Brief in this case, the effect of the "reasonable speculation" rule is to allow an appellate court to engage in a de novo review and sit as a thirteenth juror, even though it has neither had the opportunity to observe the witnesses first-hand nor deliberated with other jurors in its review of admitted evidence. Thus, as evidenced by the *O'Laughlin* decision, the Sixth Circuit's ruling in this case below not only undermines this Court's ruling in *Jackson* but nullifies the "double dose of deference" that Judge Sutton noted is required upon federal habeas

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[15] *O'Laughlin*, 2009 U.S. App. LEXIS 17646, *26-27.

review. That is: (i) deference to the jury's verdict, as contemplated by *Jackson* and (ii) deference to the State court's consideration of the jury's verdict, as mandated by AEDPA.[16]

[16] *Newman*, 543 F.3d at 801 (Sutton, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

Michael A. Cox
Attorney General

B. Eric Restuccia
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
Telephone: (517) 373-1124

Raina I. Korbakis
Assistant Attorney General
Attorneys for Petitioner

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